

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

EQT PRODUCTION COMPANY,	:	
	:	
	:	CIVIL ACTION
Plaintiff,	:	NO. 2:16-cv-00290
	:	
-vs-	:	
	:	
MATTHEW D. WENDER, in his	:	
official capacity as President	:	
of the County Commission of	:	
Fayette County, West Virginia,	:	
DENISE A. SCALPH, in her official	:	
capacity as a Commissioner of	:	
the County Commission of	:	
Fayette County, West Virginia,	:	
and JOHN H. LOPEZ, in his	:	
official capacity as a	:	
Commissioner of the County	:	
Commission of Fayette County,	:	
West Virginia,	:	
Defendants.	:	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JOHN T. COPENHAVER, JR.,
UNITED STATES DISTRICT JUDGE
JANUARY 19, 2016

APPEARANCES:

For the Plaintiff:

TIMOTHY M. MILLER, ESQ.
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For the Defendants:

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Federal Official Court Reporter

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Room 6009

Charleston, WV 25301

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1 P R O C E E D I N G S 10:05 a.m.

2 THE CLERK: All rise.

3 THE COURT: Good morning. Please be seated.

4 THE CLERK: The case before the Court is *EQT*
5 *Production Company versus Matthew Wender, Denise Scalph, and*
6 *John Lopez*, each in his or her official capacity as a
7 Commissioner of the Fayette County Commission, Case Number
8 16-cv-00290.

9 Will counsel please state your name and appearances for
10 the record?

11 MR. MILLER: Your Honor, Tim Miller and
12 Christopher Power on behalf of the plaintiff, EQT Production
13 Corporation. We have a corporate representative, Mr. Joey
14 Stumbo, also present in the courtroom with us.

15 THE COURT: Thank you.

16 MR. RIST: Good morning, Your Honor. Tom Rist and
17 Prosecutor Larry Harrah from Fayette County. We represent
18 the defendants in this case. And Matthew Wender, one of the
19 defendants, is seated at counsel table with us.

20 THE COURT: Thank you. This matter is before the
21 Court on the motion for a temporary restraining order.

22 The Court, I will tell you at the outset, would expect
23 if the temporary restraining order were granted, that we
24 would grant it for a period of 14 days, in accordance with
25 the rule. And then, either at that point, the preliminary

1 injunction request would be heard or the temporary
2 restraining order would, by agreement of the parties, be
3 continued for another seven days, so that the preliminary
4 injunction hearing itself would occur on February 11th.

5 And so I wanted you to know that in advance, that even
6 though the Court has directed the plaintiffs to provide
7 notice to the defendants, that this will proceed,
8 nevertheless, as though it is a temporary restraining order
9 request at this juncture.

10 And with that, I would ask the parties whether or not
11 you have any comments that you would wish to make before the
12 Court hears that which you propose to present?

13 MR. MILLER: Your Honor, on behalf of the
14 plaintiff, if the Court desires -- we weren't sure whether
15 you were going to take this up as a temporary restraining
16 order or a preliminary injunction at this time. We have a
17 witness here if the Court needed additional factual record
18 upon which to make a finding. The witness would
19 basically -- as a proffer, I would tell you would merely
20 testify that EQT operates 204 gas wells located within
21 Fayette County, West Virginia. They also have one
22 underground injection control well they operate in Fayette
23 County, West Virginia.

24 And I would indicate to you that at those gas wells,
25 producing gas wells, typically there is a tank in order to

1 collect water and other produced fluids that are a part of
2 the natural process of producing a gas well. So there is
3 fluid stored in those tanks at those producing gas well
4 sites until the tanks reach a certain level where that fluid
5 has to be removed and hauled and disposed of. And, in this
6 case, disposed of in the underground injection control well
7 operated by EQT.

8 So in terms of our standing, if you will, he is here if
9 the Court needed a factual record that we actually own and
10 operate gas wells, producing gas wells, how it would be
11 affected by this ordinance as well as the underground
12 injection control well that would be affected by this
13 ordinance.

14 Given that the ban is total and complete on the
15 storage, transportation, treatment, et cetera, any broadly
16 defined natural gas waste or oil waste, it would essentially
17 require it to be in compliance with this ordinance, EQT
18 would have to shut-in or stop production on all 204 of those
19 gas wells, producing gas wells, so that no fluid would be
20 collected and stored onsite in those tanks, and it would
21 also require the shutdown of the underground injection
22 control well.

23 So I think on that basis we would be able to make or
24 have made, I believe, given the verified complaint filed in
25 this action, a sufficient factual record that the Court can

1 make a finding that we, in fact, would have an injury in
2 fact here if this ordinance is taken effect, it would very
3 much impact the operations of EQT in Fayette County, West
4 Virginia.

5 For that reason, we have requested temporary
6 restraining order relief. If you'd like me to go through
7 our counts and legal arguments, fine.

8 If the Court would prefer to allow the parties to rely
9 on their briefing, I can do that as well. It's whatever the
10 Court's pleasure.

11 THE COURT: Let me ask you to what extent the UIC
12 is used for wells outside the county?

13 MR. MILLER: It is. There are surrounding
14 counties, nearby counties that are part of the same
15 district, what EQT calls the Madison District, basically
16 Jackson, Kanawha, Boone, Fayette, in that area. And the UIC
17 well does collect waste from various gas producing wells in
18 that location.

19 THE COURT: What's the estimated number of wells,
20 aside from -- I believe you said 204 in Fayette County?

21 MR. MILLER: That would be correct.

22 THE COURT: -- that would be used in the UIC?

23 MR. MILLER: If you'd let me check, Your Honor,
24 with the representative.

25 (Pause.)

1 (An off-the-record discussion was held between Attorney
2 Timothy Miller and Mr. Stumbo.)

3 MR. MILLER: Your Honor, we did actually check on
4 this. Approximately 500 wells in that region, 204 of which
5 are located in Fayette County.

6 THE COURT: And so another near 300 would be
7 affected, as well?

8 MR. MILLER: They would, Your Honor. And the
9 only --

10 THE COURT: And those, of course, we're speaking
11 of producing oil and gas wells?

12 MR. MILLER: Yes, those are producing wells,
13 correct. And these are conventional wells, vertical wells.

14 THE COURT: Do I understand you to say that if the
15 plaintiff were not afforded this relief, it would
16 immediately have to cease its oil and gas production from
17 those 500 wells?

18 MR. MILLER: To be in compliance with the
19 ordinance, I believe we'd have to do something because, as
20 the gas is produced, there's fluid associated with it, which
21 is separated at the wellhead and goes into these tanks. And
22 as we read this ordinance, it would ban any type of storage
23 or collection of any natural gas waste, including water and
24 brine, which is primarily what is collected in these tanks.

25 THE COURT: I think your position is that it's not

1 just that the UIC would be closed; you couldn't produce at
2 all, because you can't create waste?

3 MR. MILLER: Correct.

4 THE COURT: How many employees would be laid off
5 as a result?

6 MR. MILLER: I don't know that they'd be laid off,
7 Your Honor, immediately. We'd obviously be seeking relief
8 if the ban were in effect. But we have approximately -- how
9 many employees in the region, in the Madison region?

10 (Off-the-record discussion was held between Attorney
11 Timothy Miller and Mr. Stumbo.)

12 MR. MILLER: You would have eight employees whose
13 jobs primarily as well tenders to go to these well sites for
14 purposes of checking these tanks and other operations at
15 each producing gas well site, they would obviously have no
16 particular duties at that point, and the company would be
17 faced with a situation of either laying them off or --

18 THE COURT: As a practical matter, each of these
19 wells pretty well operates on its own?

20 MR. MILLER: Correct.

21 THE COURT: And somebody has to be checking it
22 from time to time?

23 MR. MILLER: Correct. And most wells are checked
24 at least once a month, depending on the particular well,
25 sometimes much more frequently than once a month.

1 THE COURT: Thank you. If nothing further, Mr.
2 Miller, let me call on the defendants.

3 And what I would really ask you initially is whether or
4 not you take exception to any of the facts that are set
5 forth in the Complaint, that is, as distinguished from
6 whether or not the ordinance is a lawful law?

7 MR. RIST: We do, Your Honor. And I think the --
8 obviously, it's one of the weaknesses of coming in and
9 responding so quickly to a -- to basically a TRO or a
10 request for a temporary restraining order is that we don't
11 have time to brief the Court and let the Court know where
12 our position is on those issues. But one of the issues
13 that's been brought up by the gentlemen this morning is
14 this -- the fact that they wouldn't be able to produce oil
15 or gas, which I think is outside the scope of what the
16 ordinance itself was written to do.

17 The ordinance itself under Section 1 states, "This
18 prohibition shall specifically apply to disposal injection
19 wells."

20 I think the point of the action that was taken by the
21 County Commission was to stop the injection into that, into
22 the UIC wells in Fayette County because of the risk that it
23 poses to our drinking water. There's only two UIC wells
24 that we know of in Fayette County or that we've discovered
25 or have come out. And so that was really the focus of this

1 ordinance that was issued.

2 And in the request for an injunction in this case, one
3 of the weaknesses of looking at that as, hey, we've got 200
4 wells that are producing oil and gas, we'll have to shut
5 those down. Well, that's not -- I don't think that that's
6 true under the facts of this case. And as this Court knows
7 with the four-part test in issuing an injunction, the
8 plaintiff has to show that they are going suffer irreparable
9 harm without relief.

10 Well, no one has filed a case against EQT. The county
11 commission hasn't sent them a cease and desist order. None
12 of that has been done. It's just, hey, this might happen.
13 Which I think is different than irreparable harm -- that
14 they're likely to suffer irreparable harm without this.

15 And I think until someone does that or some action is
16 taken against them, that they're not really risking
17 anything. They can keep producing at those wells. There's
18 no issue with that I've seen under this ordinance. That
19 would be the argument that we would make.

20 As far as the UIC well having to be shut down, that
21 would fall under the ordinance as written, Your Honor.

22 So that would be, I think, an issue that would have to
23 come up or that we'd have to deal with in this hearing or at
24 a later hearing.

25 The other thing I would bring the Court's attention to,

1 a second case was filed in federal court in this district.
2 Our understanding is it hasn't been assigned to a judge yet.
3 But that was filed by Danny Webb Construction or Danny Webb.
4 I believe the attorney for Mr. Webb is sitting in the back
5 of the courtroom. He's from Bowles Rice. And it could be
6 that when we're dealing with these issues, we might want to
7 have these cases consolidated, because the complaints are
8 very similar. We're dealing with the same issues and we're
9 going to be bringing these up at a later day.

10 THE COURT: When and where was that case filed?

11 MR. RIST: That was filed on Friday in the
12 Southern District of West Virginia.

13 THE COURT: Where?

14 MR. RIST: Here in Charleston.

15 THE COURT: And what's the style of the case?

16 MR. RIST: It's Danny Webb -- I don't know the
17 exact entity name, but it's Danny Webb versus the three
18 defendants that are in this case. They may have named the
19 county commission as an entity as well, but I don't have it
20 sitting in front of me.

21 THE COURT: Thank you.

22 MR. RIST: You're welcome.

23 THE COURT: And, Mr. Miller?

24 MR. MILLER: Yes, Your Honor. We disagree in that
25 the -- if the argument is somehow this does not apply to

1 producing gas wells and tanks where natural gas waste are
2 collected and stored, I would point out that in the
3 ordinance of Section 1, paragraphs 5 and 6, Paragraph Number
4 5, bans the sale, acquisition, storage, handling, treatment
5 and/or processing of natural gas waste or oil waste within
6 Fayette County. Period.

7 So the ordinance is very broad and applies to basically
8 any storage or handling of anything that falls within the
9 definition of natural gas waste or oil waste. And that
10 definition clearly says it includes water, brine, or any
11 other fluids associated with the production of natural gas.

12 So I disagree with the assertion that this only -- this
13 ordinance, as drafted, only applies to UIC wells. It's very
14 broad in its application. So I do take issue with that
15 argument.

16 THE COURT: Thank you. Let me ask whether or not,
17 Mr. Rist, it is the case that the ordinance as set forth
18 here is accurately stated, and that it does include the
19 handling and treatment of those same substances, so that it
20 would relate to the production of oil and gas as well?

21 MR. RIST: The -- what's being proffered as what's
22 in the ordinance is correct, Your Honor. It's the reading
23 of the ordinance where we're disagreeing. But I have no
24 issue with what they've presented as far as what the
25 ordinance says.

1 I do think they're looking at it a little more broadly
2 than what it was designed to do. But, yes, that's correct,
3 what he said.

4 MR. MILLER: Your Honor, and I had one final point
5 I forgot to mention as well. He mentioned there's no
6 irreparable harm.

7 This is a criminal and civil statute. It indicates for
8 every day somebody operates in violation, there is a penalty
9 up to a total of five-million dollars, as well as it
10 subjects the employees of EQT to criminal penalties,
11 including up to one year in prison. So to the extent that
12 we have a Hobson's choice to either willfully ignore an
13 ordinance which is passed and risk criminal civil penalties
14 or comply with the law, we're faced with a dilemma.

15 It's also a valuable property right, which we're going
16 to be denied.

17 So we think, clearly, as the case law we cited to you,
18 including there's a case in the Northern District, *SWN*
19 *Production versus Edge*, decided by Judge Stamp last week,
20 affirming that under West Virginia law, the denial of
21 operating rights under an oil and gas lease is a valuable
22 property right. And it, it is -- is irreparable and can be
23 cured by equity -- inequity by injunctive relief.

24 So we think the West Virginia and federal case law
25 would very clearly hold any type of damage to the property

1 rights of an operating oil and gas lease which prohibits you
2 from enjoying those real property rights is in fact itself
3 by definition irreparable harm.

4 THE COURT: Thank you. Anything further on that
5 matter, Mr. Rist?

6 MR. RIST: Well, Your Honor, I'm sitting beside
7 the prosecuting attorney of Fayette County. Surely they
8 could contact them to deal with whether or not there would
9 be an issue with running those gas wells.

10 As far as the balance of harms go, the reason that this
11 ordinance was passed was to protect our water supply and to
12 shut down the two UIC wells. You know, that's really what
13 we're dealing with in this case.

14 The balance of harms on our side of it, there is
15 40-some-thousand people that drink water off the water
16 system that's downstream from at least the Danny Webb well
17 that's being dealt with in the other case. That's the risk
18 that we're looking at.

19 If the Court were to say, well, when balancing these
20 two against each other, you're going to lose a property
21 right.

22 Well, is it a property right to be able to drink clean
23 water out of your faucet? Charleston knows that.

24 And so I would think that the balance of harms here is
25 not so clearcut and easily swayed to the side of the

1 plaintiff.

2 THE COURT: Thank you. Would you care to respond
3 to that, Mr. Miller?

4 MR. MILLER: Your Honor, the fact that the
5 prosecutor is here and he might use some prosecutorial
6 discretion as to whether to indict or not is not -- is
7 little comfort to EQT. Which the prosecutor could change
8 his mind a year from now and we'd be facing a
9 five-million-dollar fine or the imprisonment of employees
10 who were working at these well sites or Mr. Stumbo here.

11 So I think clearly the fact that maybe the prosecutor
12 might interpret the ordinance in a less restrictive fashion
13 does not cure the fact that the ordinance on its face
14 broadly prohibits the very property rights of producing oil
15 and gas in operating the UIC well.

16 So I think facially the statute or ordinance on its
17 face is clearly preempted under the Oil and Gas Act, which
18 does not have any savings clause reserving to municipalities
19 and commissions any authority to regulate oil and gas
20 operations. There's no savings clause which saves them the
21 right.

22 It clearly preempts this field, the Oil and Gas Act,
23 Chapter 22, Article 6 of the West Virginia Code, and
24 subsequent articles.

25 So, clearly, the -- I don't think that solves our

1 problem, the fact the prosecutor today isn't going to file
2 for indictment or a cease and desist order does not cure the
3 fact the ordinance on its face is facially defective, is
4 unconstitutional or illegal.

5 The preemption ordinance, as well as the Federal Safe
6 Drinking Water Act, I think it's clear, as well, this UIC
7 Program -- if we focus not just on the producing wells but
8 under UIC wells, it's clearly one that is regulated under
9 the Safe Drinking Water Act. The federal statute which
10 delegated to the state DEP certain abilities to regulate the
11 operations of this UIC well. We do have a permit from the
12 West Virginia Department of Environmental Protection to
13 operate this well.

14 Maybe we can tender that as an exhibit. I know we
15 recited it in our pleadings, Your Honor, that we had a
16 permit, but we didn't actually attach a copy of it to the
17 pleadings.

18 If the Court would allow me, I would just tender it as
19 an exhibit at this time.

20 THE COURT: You may present it, if you wish,
21 but -- yes, hand it to counsel for the defendant, if you
22 would.

23 MR. MILLER: So in terms of the irreparable harm
24 argument, Your Honor, it clearly would negate what the state
25 of West Virginia has allowed by this very permit I've

1 presented to you, the operation of the UIC well.

2 So we think in terms of what the interpretation of the
3 statute would be, I think it was conceded that the statute
4 at the very least is intended to ban and stop the operation
5 of two UIC wells in the county, one of which is owned and
6 operated by EQT.

7 So clearly it would be inconsistent, in conflict with
8 the Federal Safe Drinking Water Act, UIC Program; it would
9 conflict with our state permit for the DEP for operating the
10 UIC well, and basically would contradict completely the
11 DEP's authority to regulate the operations of the UIC well.

12 THE COURT: Thank you. You may want to respond to
13 that, Mr. Rist, but I want to ask Mr. Miller another
14 question first, and you can respond to both at the same
15 time.

16 Is there any authority on a matter of this nature
17 before any court in West Virginia other than, perhaps, in
18 the Morgantown City case?

19 MR. MILLER: The Morgantown City case is the only
20 one I'm aware of, Your Honor, that issued a written opinion
21 on the issue which held that the efforts to ban fracking and
22 drilling within the city confines was, in fact, preempted by
23 the Oil and Gas Act.

24 I'm not aware of any other authority, written
25 authority, certainly not from the state supreme court, and

1 I'm not aware of any from any other circuit courts.

2 THE COURT: Thank you.

3 And, Mr. Rist.

4 MR. RIST: On that question, I'm also not aware of
5 any other authority, Your Honor.

6 On the previous issue with what counsel was saying on
7 the, on the Safe Drinking Water Act, there is actually a
8 savings clause in there, and counsel placed that in their
9 memorandum of law that was attached to this motion, that
10 does say that the local authorities can adopt and enforce
11 law or regulation respecting drinking water.

12 But I think one of the other issues that we're dealing
13 with here is that this is a state implemented permit. That
14 was what was tendered to the Court. This permit has -- was
15 granted by the West Virginia DEP. It's not sent out by the
16 EPA. And I do think that we're going to have to flesh out
17 the issue as to whether or not that is a federal issue and
18 that this falls under the Safe Drinking Water Act or if
19 we're dealing with just looking at the laws on the issuance
20 of the UIC permit by the West Virginia DEP under the West
21 Virginia Code. So there could be an issue with that. I'm,
22 frankly, not able to present that today. I think that would
23 have to be something that we would bring up during a later
24 hearing in this case.

25 THE COURT: All right. Just one moment.

1 I'll ask you, finally, do the parties have
2 anything further to present at this time?

3 MR. MILLER: No, Your Honor, unless you'd like to
4 hear from the witness to describe to you the number of wells
5 which we operate, which I've already proffered to the Court.

6 MR. RIST: And I don't have any objection to the
7 proffer that was made. I believe that to be true.

8 I will tell the Court that I made a mistake in
9 something I said earlier. I forgot, Danny Webb actually has
10 two UIC wells. I don't know that it matters, but I want to
11 make sure that we're clear on that. And so we think --
12 there's three that we know of, there may be four UIC wells
13 in Fayette County. But there's three, if you're dealing
14 with this party and the other party that we know have come
15 forward, Your Honor.

16 THE COURT: Thank you. I would ask the parties
17 what probably was already evident, but is this the first
18 such ordinance of this kind by any county in the state of
19 West Virginia so far as you are aware?

20 MR. RIST: It is, as far as we know, Your Honor.

21 MR. MILLER: It is, Your Honor.

22 THE COURT: Thank you.

23 The Court, for purposes of the temporary
24 restraining order only, accepts the factual statement set
25 forth in the Complaint. Based thereon, the Court finds that

1 the plaintiff is subject to irreparable harm were temporary
2 restraining relief not granted.

3 The Court further finds that, in view of the
4 comprehensive nature of the West Virginia Oil and Gas Act
5 and that of the Federal Safe Drinking Water Act, that there
6 is a likelihood of success on the merits by the plaintiff in
7 this matter, and that, taking into account the public
8 interest, the Court finds that an injunction at this stage
9 is in the public interest, that the balance of equities tip
10 in favor of the plaintiff, and the Court accordingly awards
11 the temporary restraining order relief. Subject, however,
12 to the posting of adequate security.

13 And at this point, I would hear the parties on that
14 issue as to what it should be.

15 MR. MILLER: Your Honor, from the standpoint of
16 the plaintiff, at this point, we don't know of any financial
17 or monetary harm that would occur to the Commission by the
18 granting of this temporary restraining order and/or
19 preliminary injunction. As was conceded at this point, the
20 prosecutor apparently doesn't intend to issue any cease and
21 desist orders, so I don't see where there is any immediate
22 and irreparable harm they are going to suffer by the
23 granting of the TRO. I think, therefore, for that reason, a
24 nominal bond is all that would be required in this case.
25 And by that, I am suggesting \$500 or some nominal amount be

1 posted as bond.

2 MR. RIST: Your Honor, I, frankly, agree. I don't
3 know that a huge bond needs to be posted. If it's something
4 nominal, that's fine.

5 THE COURT: The Court will direct the posting of a
6 \$10,000 bond. And I take it that that's something that
7 could be done immediately?

8 MR. MILLER: Yes, Your Honor. Very short notice,
9 we can do that.

10 THE COURT: The Court issues the temporary
11 restraining order for a period of 14 days, as I've
12 indicated. As a consequence, the next hearing in the matter
13 will be scheduled for February 4th, at 10:00 a.m.

14 I'm going to suggest this to the parties, that you
15 confer and see if you can't agree on two things:

16 One, that the temporary restraining order be continued
17 for a further week, to February 11th at 10:00 a.m.; and,
18 two, that you undertake to stipulate all facts, to the
19 extent you can, in order to save substantial effort and time
20 at the hearing.

21 I would expect that the parties ought to be able to
22 stipulate to most everything as set forth in the Complaint
23 by agreement insofar as those are factual matters. The law
24 matter is quite different, and the parties, if need be, will
25 be given an opportunity to proffer their brief once we have

1 reached a point where the matter is heard on preliminary
2 injunction and has been taken under advisement by the Court.

3 I would welcome, however, any briefing that you might
4 want to do in advance of that.

5 And so, having in mind that basically we first need to
6 establish the facts and that you likely will be able to
7 stipulate to much of them, I'm wondering whether or not it
8 would be feasible for counsel to, within the next 10 days,
9 have worked up a stipulation of facts, and then, on the
10 basis of that, any briefing that could be done to follow
11 immediately.

12 Let me ask from your own schedules whether or not it's
13 feasible for you to do that?

14 MR. MILLER: I believe it is for the plaintiff,
15 Your Honor, yes.

16 MR. RIST: It's also feasible to us, Your Honor.
17 And I'll just let the Court know, we're fine with the TRO
18 continuing through the February 11th hearing. We're not
19 going to have an issue with that. We'll agree with that.

20 THE COURT: Well, that will give us a little more
21 time then for briefing beforehand, which I believe will
22 probably be valuable in that I suspect you're going to be
23 able to agree pretty much on what the facts are. And in the
24 final analysis, it simply comes down to whether or not the
25 ordinance is a lawful act.

1 So first with respect to the 10 days for stipulation,
2 is that feasible?

3 MR. RIST: Yes, Your Honor.

4 MR. MILLER: Yes, Your Honor.

5 THE COURT: When you've reached that stipulation
6 then, I'll ask you to file it with the Court, and briefing
7 can proceed on the basis of it. Insofar as the, as the
8 briefing is concerned, I take it that the appropriate thing
9 would be for the plaintiff to file the first brief. And how
10 much time after that 10 days, after that stipulation is
11 arrived at, do you need for that purpose, do you believe,
12 Mr. Miller?

13 MR. MILLER: Three days will be fine, Your Honor.

14 THE COURT: How long?

15 MR. MILLER: Three days.

16 THE COURT: All right. And so with that coming in
17 in three days, is another week enough for you, Mr. Rist?

18 MR. RIST: Yes, Your Honor, that's adequate.

19 THE COURT: And that takes care of 10 days of the
20 time. And I believe that leaves us with another three days
21 or so in which you could file a reply.

22 In the meantime, I understand that the parties to be in
23 agreement that the temporary restraining order could be
24 continued for another seven days to February 11th, at
25 10 o'clock?

1 MR. RIST: Yes, Your Honor, that's correct.

2 MR. MILLER: Yes, Your Honor.

3 THE COURT: I probably should say, throughout the
4 entirety of that day would probably be a better thing to
5 say, and that's the way it will be framed.

6 And so with that, I would ask the parties whether or
7 not you have anything further at this time?

8 MR. MILLER: Nothing further, Your Honor.

9 MR. RIST: Your Honor, I think I should clarify
10 the, as far as the scope of the restraining order, in the
11 document that was submitted by the plaintiff, it was
12 restraining a number of parties that aren't present in this
13 action. My understanding would be that the scope of this
14 would only apply to, basically, the three defendants that
15 were named, the County Commission of Fayette County, as far
16 as sending out a cease and desist order or taking some
17 action against the defendants. Is that --

18 THE COURT: Do you wish to be heard on that
19 matter, Mr. Miller?

20 MR. MILLER: I do, Your Honor. I think it needs
21 to be broader than that. The ordinance also included
22 enactment of private citizens through its powers delegated
23 to private citizens to enforce this action. So I think the
24 TRO order itself would have to basically indicate that the
25 ordinance itself is, at this point, invalid and no lawful

1 effect until such time as otherwise determined by the Court,
2 so that we're not at risk of private citizen suits or other
3 action taken.

4 THE COURT: Anything further on the point?

5 MR. RIST: No, Your Honor.

6 THE COURT: It seems to me that the most reach
7 of -- the greatest reach of the temporary restraining order
8 would be the defendants in this action and those acting in
9 concert with them, and so the breadth of the temporary
10 restraining order would be limited to that extent.

11 Is there anything further?

12 MR. RIST: No, Your Honor.

13 MR. MILLER: No, Your Honor.

14 THE COURT: If not, then we'll stand continued as
15 indicated and we'll await your further submissions.

16 Thank you.

17 MR. MILLER: Your Honor, I do have one query.

18 Did you want us to prepare a written order including
19 findings of the Court for submission?

20 THE COURT: I'd be happy for you to do that. Are
21 you able to do that today?

22 MR. MILLER: We can do that, yes.

23 THE COURT: And run a copy of that by the defense
24 counsel, and if you are able to reach agreement on what has
25 taken place today, that's fine. If you can't, then you'll

1 simply have to furnish what you propose to the Court, in the
2 absence of agreement, and the Court will then take that into
3 account in framing the order.

4 So we'll hear from you later today, I take it?

5 MR. MILLER: Yes, Your Honor. Thank you.

6 THE COURT: Thank you.

7 THE CLERK: All rise.

8 (Proceedings concluded at 10:45 a.m.)

9 CERTIFICATE OF OFFICIAL REPORTER

10 I, Catherine L. Schutte-Stant, Federal Official Court
11 Reporter, in and for the United States District Court, for
12 the Southern District of West Virginia, do hereby certify
13 that the foregoing is a true and correct transcript of the
14 stenographically reported proceedings held in the
15 above-entitled matter.

16 Dated February 2, 2016.

17
18 /s/ CATHERINE L. SCHUTTE-STANT, RMR, CRR

19 CATHERINE L. SCHUTTE-STANT, RMR, CRR
20 FEDERAL OFFICIAL COURT REPORTER
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